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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I,
Affirming a Judgment of Conviction Entered by the
Milwaukee County Circuit Court, Judge Dennis R. Cimpl
Presiding, and from an Order Denying the Postconviction
Motion, Judge Ellen R. Brostrom Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

This case stems from a tragic accident between two drunk drivers. Leopoldo Salas Gayton entered I-94 in the wrong direction, crashed into Corrie Damske and killed her. The circuit court described Damske as a beautiful, young mother, minding her own business, tragically taken away. It repeatedly called Salas Gayton an illegal alien, highlighted his Mexican heritage, and sentenced him to the 15-year maximum term of incarceration, though he had no prior OWIs. In Wisconsin, the median term of incarceration for all OWI homicides, including those involving repeat OWI offenders, is 5 years.¹

There are an estimated 76,000 undocumented immigrants in Wisconsin.² Some of them become involved in our criminal justice system, and they are entitled to due process of law. This case gives the Wisconsin Supreme Court an opportunity to establish the protocol circuit courts should follow when sentencing an undocumented immigrant. Specifically:

- A circuit court may not sentence a defendant more harshly because he is an “illegal,” an “illegal alien,” or an “illegal immigrant” or because of his alienage, ethnicity, or national origin.
- A circuit court may consider a defendant’s immigration violation as unlawful or uncharged conduct only if it is based on accurate and reliable

¹ Eric Litke, *Scales of Justice or Roulette Wheel?* Available at: <http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/> (last visited Dec. 14, 2015).

² *Profile of the Unauthorized Population: Wisconsin*, Migration Policy Institute, available at: <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WI> (last visited Dec. 18, 2015).

information and only if it reasonably relates to the sentencing decision.

The Wisconsin Supreme Court should vacate Salas Gayton's sentence and remand this case for a new sentencing hearing where the circuit court must apply these principles.

ISSUE PRESENTED

Whether a sentencing court may rely on a defendant's illegal immigrant status as a factor in fashioning a sentence; and if such reliance is improper, whether it is a structural error or subject to a harmless error analysis.

The court of appeals acknowledged that the circuit court relied upon Salas Gayton's status as an "illegal alien" from Mexico as a "minor" factor when it imposed a bifurcated sentence that included the maximum term of initial confinement. It nevertheless held that this was not an erroneous exercise of sentencing discretion. Judge Kessler filed a concurring opinion observing that, based upon the sentencing transcript, Salas Gayton could reasonably believe that the circuit court considered his immigration status a significant negative factor at sentencing, but she approved the sentence. *State v. Salas Gayton*, No. 2013AP646-CR, unpublished slip op. ¶23 (Wis. Ct. App. Oct. 7, 2014)(App. 101).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal presents an issue of first impression for Wisconsin. As suggested by this Court's decision to grant review, it is worthy of oral argument and a published decision.

STATEMENT OF THE CASE AND FACTS

The Charges and Plea

On January 6, 2011, the State filed a criminal complaint against Salas Gayton, alleging: count 1, homicide by intoxicated use of a vehicle, contrary to Wis. Stat. §§ 940.09(1)(a)1 and 939.50(3)(d); count 2, homicide by intoxicated use of a vehicle (prohibited alcohol concentration), contrary to Wis. Stat. §§ 940.09(1)(b) and 939.50(3)(d); and count 3, operating without a license - causing death, contrary to Wis. Stat. §§ 343.05(5)(b)3d (2009-10) and 939.51(3)(a). (R.2).

According to the complaint, Salas Gayton drove his vehicle in the wrong direction in the westbound lanes of I-94 in Milwaukee on the morning of January 1, 2011. He collided with the vehicle driven by Corrie Damske, and she was pronounced dead at the scene. A toxicology report showed that Salas Gayton's blood alcohol concentration ("BAC") approximately two hours and twenty minutes after the accident was .145, which is over the legal presumptive intoxication limit. (R.2).

Damske's BAC was .21—nearly 3 times the legal limit—at 7:20 a.m., the time of her death. (R.2, R. 7).³

The State filed an Information containing counts 1 through 3 from the complaint. Salas Gayton pled not guilty to all three counts. On May 17, 2011, the circuit court conducted

³ The district attorney filed a motion in limine to exclude from trial toxicology reports showing that Damske's BAC was .21. Salas Gayton pled, so the circuit court did not decide the motion. Nevertheless, under Wisconsin law, the victim's characteristics are relevant to the defendant's sentence. See *State v. Gallion*, 2004 WI 42, ¶68, 270 Wis. 2d 535, 678 N.W.2d 197;. See also *State v. Spears*, 227 Wis. 2d 495, ¶25, 596 N.W.2d 375 (1999)(victim's criminal record is relevant to rebut family's portrayal of her.)

a plea hearing during which Salas Gayton changed his “not guilty” plea and pled “no contest” to counts 1 and 3. Count 2 was dismissed by operation of Wis. Stat. §940.09(1m)(b). (R.4).

The Sentencing

On July 22, 2011, the Honorable Dennis R. Cimpl held a sentencing hearing. At the outset, he informed the parties that he had received a January 17, 2011 report from Dr. John Pankiewicz regarding Salas Gayton’s competency, a June 29, 2011 probation department memo regarding the attempt to prepare a PSI, a restitution memo, six letters from Damske’s family and friends; and a letter from Salas Gayton’s fiancée.⁴

Damkse’s friends and family described her as “magnificent,” “beautiful,” “lovely,” “passionate,” and devoted to her daughter, who had just turned ten. They urged the court to give Salas Gayton the maximum sentence because he is an “illegal alien,” an intentional violator of American laws, a “miserable drunk,” and a “killer.” Consider these excerpts:

From Attorney James Friedman, a family friend:

Not only was Mr. Gayton in the country illegally, but he had no driver’s license and no liability insurance so that there might be some reparation for his actions. He clearly availed himself of all the privileges and freedoms of being in America without being willing to assume any of the responsibilities that go along with it. He had been stopped several times by law enforcement previous to killing Corrie. Each time he escaped by

⁴The circuit court did not include the listed letters in the record for the appeal. Thus, the court of appeals did not have them when it decided this case. The undersigned counsel was first appointed to represent Salas Gayton when his case reached the Wisconsin Supreme Court. She discovered the oversight and filed a motion to supplement the record, which this Court granted on December 9, 2015. *See* R.49-R.55.

providing phony identification. He clearly and intentionally sought never to comply with the law. Had law enforcement been able to identify him as an illegal alien, he would have been deported and this tragic accident would never have occurred.

He repeatedly and intentionally avoided law enforcement. He completely disregarded every basic requirement that applies to all of us when operating a motor vehicle. He intentionally drove around while consuming copious amounts of alcohol. He again sought to avoid law enforcement by going the wrong way on a highway and Corrie happened to be in the wrong place at the wrong time in the face of this *purposeful law breaker who has no regard for the rights or safety of others.* Clearly his conduct merits the most severe of punishments. In fact, the maximum penalty allowed here is nowhere near severe enough in relation to his conduct.

(App.185).

From Damske's father, Kurt Damske:

Why did Leopoldo Salas Gayton *kill (murder)* my daughter? *The fact that Mr. Gayton was not even in this country legally is only a small part of the problem as I see it. He was selfish, non-law-abiding, non-empathetic, possibly miserable drunk that made choices that can kill innocents—men, women, and children. A person like him should not be allowed on the street at all.* Be it a car or a gun, he killed and should receive the maximum penalty allowed.

(App.187).

From Peggy Lamb, Hayden's grandmother:

It is absolutely impossible to comprehend how such a horrible accident could have occurred, because:

1. *Mr. Gaytan [sic] is in the United States illegally and therefore already a criminal.*
2. Mr. Gayton had been apprehended several times for past driving violations and was *never turned over to immigration authorities.*
3. *Mr. Gaytan has no regard or respect for the laws of our country and our community.*
4. *Mr. Gayton had no right to not only live, work and drive in our country; he certainly did not have the right to be indifferent to the safety and well being of others.*
5. *If Mr. Gayton had been turned over to the proper immigration authorities, he would not have been driving the wrong way on I-94 while intoxicated on January 1, 2011—as he would have been previously deported back to his own country.*

(App.188-189).

From Damske's sister, Jennifer Damske:

[Leopoldo] was so intoxicated that he stated he didn't remember the accident. Judge Cimpl, drunk driving is not acceptable. Add homicide to that and it deserves nothing less than the max sentence. He took a life and put countless others in danger, including himself, with his actions . . . He couldn't even remember the accident! That is appalling. Please give my family and Corrie's loved ones some satisfaction and bring this man to justice. People need to know that drunk driving will not be tolerated. It kills!

(App.192).

The circuit court said that it had reviewed all of the letters submitted. (App. 125-126). Then the district attorney argued for a “substantial period of confinement” because Salas Gayton killed “a beautiful, loving mother. She was 34

years old.” (App.132). Damske, he said, “was a woman who simply was driving on the freeway.” (App.131). He stressed: “She was secure in the fact that she was traveling properly in the right lane when something happened that could make any of us victims of a homicide, and that is that the defendant made a choice, perhaps because he was intoxicated not a knowing choice; but he made a choice to get on the freeway and drive the wrong way.” (*Id.*) “The defendant’s blood alcohol level was .145, close to twice the amount of the legal limit allowed in the State of Wisconsin for a prima facie case of intoxication,” he emphasized. (App.132-133). He pointed out that Salas Gayton had previously been convicted of two violations for driving without a license. (App.133-134).

Then Damske’s mother spoke at the sentencing hearing. She described how awful it was to lose her daughter and for her granddaughter to lose her mom. She also stated that “Mr. Gayton made a choice, a choice to live for years *in this country without citizenship.*” (App.142). (Emphasis supplied). She noted that this was one of his choices that claimed the life of her daughter. (*Id.*)

Next, Michelle Friedman, Damske’s friend and the wife of James Friedman, addressed the court. Among other things, she said:

This is the moment in [sic] truth in sentencing, and what does a man who killed [Damske] *in exchange for easy drink and selfish and irresponsible conduct deserve?* We cannot contemplate that he was down on his luck, has a fifth-grade education, is an alcoholic or any other excuse one might give.

Killing Cory [sic] was *not his first act of lawlessness*. It was just one of a series of times for which he was caught. *He had no intentions [sic] of complying with the laws in this country, and that was proven when his feet hit U.S. soil as an illegal immigrant.*

At the time of this homicide, he had no license, no insurance and *no intention of respecting the law that governs our country.*

He came to this country and availed himself of the privileges we provided to our citizens, but he had no intentions to [sic] complying with our laws. Then he stepped up his lawlessness by killing a productive, passionate, beautiful and loving individual . . .

[W]e have the power in this case to not only issue a stiff sentence but also *make a strong statement about* the tragedy and pain caused by *drinking and driving.*

(App. 146-147). (Emphasis supplied). She continued:

The issue of punishment is one that some judges are remiss to do in similar cases and give him the maximum. 15 years in prison and after that *swift deportation is a well-deserved punishment.* . .

A punishment of less than the maximum, 15 years in jail and 10 years supervision, *a/k/a deportation*, would also unduly depreciate the seriousness of this crime.

(App. 148). (Emphasis supplied).

Then defense counsel spoke and stressed that Salas Gayton has no prior convictions. He has held a job and contributed to the community ever since he arrived in the United States. He has never applied for or received government aid. He did have a drinking problem but he found sobriety and had been involved in a program to help others stop drinking. (App.157-159).

Counsel noted that Salas Gayton had a prior municipal citation and misdemeanor conviction for driving without a license, but this was his first time in court for drinking and driving. (App.161-162). She noted that this offense is “committed across the board in the community by people of

all ages, races, background, citizens and non-citizens alike.” (App.152). She pointed out that Salas Gayton had an almost completely clean criminal record, a point that the district attorney stipulated to. (App.154-156). She stressed:

So to say that he had no intention of following the laws of this country and basically has broken every law that he had an opportunity to do, it’s just not true, Your Honor.

(App.154).

Defense counsel argued that Salas Gayton’s non-citizen status was irrelevant to the court’s sentencing decision, but the court disagreed:

Ms. Johnson: *The fact as I see it that Mr. Salas is not a citizen in my opinion, as it relates to this case, is not terribly relevant. He came—*

The Court: *It goes to character.*

Ms. Johnson: I agree. He did come to this country to work. He has positively supported himself in the community. For the most part, he stayed out of the criminal justice system. *To say that he does not value our laws [and has] been a detriment to the community, I don’t think is an honest statement.*

(App.160). (Emphasis supplied).

Counsel said that she had done research regarding the sentences given in similar cases and found that defendants had received probation with substantial condition time and community service. (App.163). She asked for two years of initial confinement with extended supervision left to the court. (App.163).

Next, the mother of Salas Gayton’s fiancée spoke to the court. She explained that Salas Gayton was in love with

her daughter. He had been sober for 3.5 years but he and her daughter had had a disagreement on New Year's Eve (just before the accident), and he began to drink. (App.164-168). The court again interrupted:

The Court: Well, according to the report that I got from Dr. Pankiewicz, he is married to somebody. *His wife is in Mexico.*

(App.165). (Emphasis supplied). Salas Gayton explained that he had never married. (*Id.*)

Salas Gayton told the court that he used to live on the streets of Milwaukee until someone helped him find a job, a place to sleep and a church to attend. Just as someone helped him, he started to help others. (App.169-170). He begged for forgiveness. At the time of the accident, he was not even aware that he was driving. He said: "I never thought I could feel so much pain for something I did, for something I did and caused, I'm truly sorry because I drank again." (App.170).

Finally, the court began its sentencing decision, noting that it had to address restitution (which it considered easy), but the other objectives were not.

The other goals are punishment, deterrence. That means sending a message to you, Mr. Salas as well as everybody in the community that you just can't get behind a wheel of [sic] car, 4,000 pounds, a 4,000 pound weapon, if you're intoxicated without suffering consequences. That's deterrence.

Then the last goal is rehabilitation, and that's somewhat hampered in your case by your status. Because *I don't know what the United States government is going to do with you when this sentence is over. I don't know if they're going to deport you.* I have no power in that regard.

(App.171). (Emphasis supplied).

Highlighting the serious nature of the crime, the court said: “A young woman is dead, 34 years old, *beautiful, out on the first day of the year driving. Minding her own business* and tragically taken away from us.” (App.172)(emphasis supplied).

There is a reason we have licenses in this country and all the world, and that is we just don’t let anybody get behind that automobile which can be a weapon.

Mr. Williams [district attorney] said in your state you might have been better shooting a gun at the freeway. You probably would have missed everybody, rather than aiming the weapon that you did.

(App.172).

The court recounted that Salas Gayton had been driving with a .145 BAC. Afraid that he would be stopped, he inadvertently entered the highway heading the wrong direction, and traveled for about a mile at 50 mph. (App.172-173). The court added:

The fact that you’re an illegal alien doesn’t enter into the serious nature of the crime or the need to protect the community. It goes to character. It’s a minor character flaw very honestly.

(App.173). (Emphasis supplied).

The court told Salas Gayton to look around the courtroom because four major television stations had cameras there. “They want to know what happens to somebody who takes a car, a weapon, and drives drunk and kills somebody . [I]f I had one wish, what I would ask is that the television stations say, you drive drunk, first time, second time, third time, fourth time, fifth time, you go to prison.” (App.174). The court said that Salas Gayton did not intend to kill the victim but that he did intend to drive drunk. (App.175).

Turning to the matter of Salas Gayton's character, the court said:

You're from the nation of Mexico. You've got a 5th grade education. You're in this country for 13 and half years, Milwaukee for two years. You've got three kids in Mexico.

* * *

You've got sporadic employment, trying to better yourself. *That's why you're in this country. Although you're here illegally, it's a factor, a minor factor, but it goes to your character.*

(App.176). (Emphasis supplied).

Later the court said:

[Ms.] Johnson correctly stated that [drinking] never interfered in his life. Never had a serious enough crime for us to try and intervene. But he could have done that on his own, even as an illegal in this country.

There's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems. He could have done it on his own. He didn't.

(App.178). (Emphasis supplied).

When you get out, *if you're allowed to be in this country*, you will seek and maintain full-time employment. While you're in prison get yourself a GED or HSED; so that even if you're not allowed back in this country and *you go back to Mexico*, you have those skills.

(App.179). (Emphasis supplied).

On count 1, the court imposed 22 years imprisonment (15 years initial confinement/7 years extended supervision).

On count 3, it imposed 9 months imprisonment to be served concurrently.⁵ (App.180).

The Postconviction Decision

Salas Gayton filed a Wis. Stat. § 809.30 postconviction motion for plea withdrawal arguing that the circuit court failed to properly advise him of the immigration consequences of his “no contest” pleas by deviating from the immigration advisement mandated by Wis. Stat. § 971.08(1)(c) and that he would likely be deported and excluded from admission to the United States because of his pleas. (R.29).⁶ Alternatively, Salas Gayton moved for resentencing on the grounds that the circuit court did not explain why it imposed the maximum period of initial confinement contrary to *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 and *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). Lastly, he challenged the DNA surcharge imposed. (R.29). The court denied the postconviction motion without a hearing, held that the sentencing record fully complied with *Gallion*, and set forth a sufficient rationale for imposing a DNA surcharge. (App.114-117).

The Court of Appeals Decision

Salas Gayton appealed and raised the same issues but stressed the sentencing court’s improper reliance on the fact that he is an “illegal alien.” The court of appeals held that the circuit court: (a) did not erroneously exercise its discretion in sentencing Salas Gayton, (b) did not improperly refer to or

⁵ For count 1, the maximum term of imprisonment is 15 years of initial confinement and 10 years of extended supervision. For count 3, the maximum term of imprisonment is nine months.

⁶ Salas Gayton’s counsel withdrew this particular issue from his appeal after the court of appeals decided *State v. Mursal*, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173.

rely upon Salas Gayton's "status as an alien" as an aggravating sentencing factor, and (c) gave a sufficient reason for imposing a DNA surcharge upon Salas Gayton. (App.101-112).

Judge Kessler, concurring, noted that Salas Gayton could reasonably believe that the court considered his immigration status "a *significant negative factor* when imposing his sentence." (App.113). (Emphasis supplied). She said that the court of appeals is "increasingly" seeing "appeals claiming error in sentencing based on the sentencing court's multiple referrals to a defendant's race, ethnicity or immigration status." (App.113). Thus, she cautioned:

Sentencing courts should be cognizant that defendants may perceive judicial impropriety in sentencing when multiple comments based on race, ethnicity or immigration status are made. When the perception of bias reasonably exists, the perception of fairness suffers, to the detriment of the judicial system as a whole.

(App.113).

Salas Gayton filed a petition for review that challenged all three holdings by the court of appeals. This Court granted review on one issue, which it framed for itself. (App.198).

ARGUMENT

I. Definition of Terms and General Principles of Immigration Law.

There is little Wisconsin case law regarding the intersection between immigration and criminal law. Some definitions and basic principles are thus helpful to understanding the issue in this case.

Foreigners who live in the United State without authorization or documentation are sometimes called “unauthorized immigrants,” “undocumented immigrants,” “illegal immigrants,” “illegal aliens” and other names.⁷ These terms obviously have two parts: an adjective and a noun (alien or immigrant). “Alien” according to the Department of Homeland Security and the Immigration and Nationality Act, means “any person not a citizen or national of the United States.”⁸ “Immigrant” means “every alien” except those who fall into certain classes of nonimmigrant aliens. 8 U.S.C. § 1101(15). All of the terms signify alienage or a person having a national origin other than the United States, *i.e.* a foreigner.

According to the Pew Research Center, there are over 11 million “unauthorized immigrants” in the United States.⁹ It is estimated that nearly half of them entered the United States legally with, for example, visas or border crossing cards, and later violated the terms of their admission. The other half are believed to have evaded immigration inspectors and border patrol.¹⁰ Thousands of “illegal immigrant” children arrive in

⁷ A concurrence to the order granting review in this case calls for the Wisconsin Supreme Court to refrain from using the term “illegal immigrant” because it is pejorative and attempts to define a person rather than his conduct. (App.200). Consistent with this view, the Associated Press recently changed its style book for authors. Now “illegal” may be used to describe conduct, not people. <https://blog.ap.org/announcements/illegal-immigrant-no-more> (last visited Dec. 8, 2015). One recent U.S. Supreme Court opinion uses the term “unauthorized alien.” *Arizona v. U.S.*, __U.S.__, 132 S.Ct. 2492 (2012). Another uses “undocumented immigrants.” *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

⁸ See <http://www.dhs.gov/definition-terms> (last visited Dec. 8, 2015) and 8 U.S.C. § 1101(3).

⁹ See *Unauthorized Immigrants: Who they are and what the public thinks*, <http://www.pewresearch.org/key-data-points/immigration/> (last visited Dec. 8, 2015).

¹⁰ See *Modes of Entry for the Unauthorized Migrant Population*, <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/> (last visited Dec. 8, 2015).

the United States each month—many brought here by their families.¹¹ In 2014, Mexicans made up about half of “unauthorized immigrants” in the United States.¹²

The terms “illegal immigrant” and “illegal alien” carry pejorative connotations. They suggest a “diminution of personhood” and are “particularly associated with racism toward Mexicans and other Latinos and Latinas.” Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern American*, Note on Language and Terminology XIX, Princeton University Press 2004.¹³ The Urban Dictionary defines an “illegal immigrant” as, among other things, “an illegal alien,” “a criminal,” “a selfish and/or cowardly person unwilling to positively change the socio-economic and political problems in his/her own country in order to benefit everyone, including him/herself, and thus runs away to another country to hide.”¹⁴ It defines an “illegal alien” as “one who resides in the country without papers. PC term is undocumented worker. Cf. wetback, mojado.”¹⁵

The concept of an “illegal alien” is so negatively charged, that, in personal injury cases, the Wisconsin Supreme Court will not allow a jury to hear that the plaintiff

¹¹See *Influx of Central American Teen and Family Arrivals Continues*, available at: <http://cis.org/vaughan/influx-central-american-teen-and-family-arrivals-continues> (last visited Dec. 8, 2015).

¹²See *What We Know About Illegal Immigration from Mexico* <http://www.pewresearch.org/fact-tank/2015/11/20/what-we-know-about-illegal-immigration-from-mexico/> (last visited Dec. 8, 2015).

¹³ See also *The Evolution of the Immigration Term: Alien*, available at: <http://www.npr.org/2015/08/19/432830934/the-evolution-of-the-immigration-term-alien> (last visited Dec. 22, 2015).

¹⁴ See <http://www.urbandictionary.com/define.php?term=illegal+immigrant> (last visited Dec. 8, 2015).

¹⁵See <http://www.urbandictionary.com/define.php?term=illegal+alien> (last visited Dec. 8, 2015). It defines a “wetback as “a derogatory term used to describe Mexicans who have immigrated illegally to the United States by swimming or wading across the Rio Grande . . .” *Id.*

is an “illegal alien” from Mexico, even though that fact is relevant to the calculation of lost future earnings and life expectancy. Such evidence is too prejudicial. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 138-143, 403 N.W.2d 747 (1987).

Like-minded courts explain that immigration status is a “highly charged area of political debate,” and the probative value of illegal immigrant status is low while the prejudicial effect is high. ***Republic Waste Services, Ltd v. Martinez***, 335 S.W.2d 401, 409 (Tex. Ct. App. 2011); *see also Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, ¶20, 230 P.2d 583 (2010)(immigration status is a politically sensitive issue that can inspire passionate responses rather than reasoned deliberation). In fact, many courts hold that “[i]mmigration status alone does not reflect upon an individual’s character and thus is not admissible for impeachment purposes.” ***Ayala v. Lee***, 215 Md.App. 457, 480, 81 A.3d 584 (2013)(see cases cited therein). *See also*, American Bar Association, ***A Judge’s Guide to Immigration Law in Criminal Proceedings***, 3-23 to 3-25 (P. Goldberg and C. Wolchok eds. 2004).¹⁶

Congress made improper entry into the United States a misdemeanor punishable by up to 6 months in prison and/or a \$250 fine. 8 U.S.C. §1325(a) & (b). It is considered a petty offense. ***Blanton v. City of North Las Vegas, Nev.***, 489 U.S. 538, 542-543 (1989). By comparison, reusing a postal stamp that has passed through the mail without being cancelled is punishable by up to one year in jail. *See* Gabriel Chin, ***Illegal Entry as a Crime, Deportation as Punishment: Immigration Status and the Criminal Process***, 58 UCLA L. Rev. 1417, 1449 (2011) (citing 18 U.S.C. §1820).

¹⁶ Exceptions are made where the witness opens the door to such evidence or where exclusion of the evidence violates the defendant’s right to confrontation.

The fact that a person once entered the United States improperly does not mean that he is in a perpetual state of illegality. Improper entry is not a continuing offense. *U.S. v. Cores*, 356 U.S. 405, 408 n.6 (1958). “As a general rule, it is not a crime for a removable alien to remain in the United States.” *Arizona v. U.S.*, __U.S.__, 132 S.Ct. 2492, 2505 (2012). Nor is it a crime for undocumented immigrants to engage in unauthorized work. *Id.* at 2504 (noting that it is a crime for *employers* to hire undocumented immigrants).

Whether they are deportable or not, undocumented immigrants have the right to due process and equal protection under the Fourteenth and Fifth Amendments to the United States Constitution:

Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.

Plyer v. Doe, 457 U.S. 202, 210 (1982); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Because undocumented immigrants are entitled to equal protection, they cannot be discriminated against on the basis of national origin. Citizenship and national origin are closely related concepts. Thus, the U.S. Supreme Court recognizes that discrimination on the basis of citizenship can have the effect of discrimination on the basis of national origin. *Espinoza v. Farah Mfg. Co., Inc.* 414 U.S. 86, 92 (1973). This is especially true for Mexicans, who as noted above, comprise the largest share of the undocumented immigrants in the United States. *See Leticia M. Saucedo, Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 Ariz. St. L.J. 305 (2012).

II. The Circuit Court Erred in Sentencing Salas Gayton More Harshly Because He Is an “Illegal Immigrant.”

A. Standard of review and law governing sentencing.

An appellate court generally presumes that a circuit court’s sentencing decision is reasonable and reviews it for an erroneous exercise of discretion. *Gallion*, ¶17. A proper exercise of discretion is based on “facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards.” *Id.*, ¶19 (citing *McCleary* at 277).

“A defendant has a constitutional right to a fair sentencing process ‘in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.’” *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. A sentencing decision based upon inaccurate information violates due process of law *Id.* A sentencing decision based upon race, gender, national origin or stereotypes also violates due process of law. *State v. Harris*, 2010 WI 79, ¶¶32, 33 n.9, 71, 326 Wis. 2d 685, 786 N.W.2d 409; *see also State v. Alexander*, 2015 WI 6, ¶23, 360 Wis. 2d 292, 858 N.W.2d 662. Whether a defendant has been denied due process at sentencing is a constitutional question that an appellate court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

When sentencing a defendant, a court is to consider the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and other applicable

mitigating or aggravating factors. *Gallion*, ¶41.¹⁷ A court must identify which of these sentencing objectives is of greatest importance and “explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.” *Id.* ¶43. “By stating this linkage on the record,” a court produces a sentence that can be more easily reviewed for a proper exercise of discretion. *Id.* ¶43.

B. The circuit court denied Salas Gayton due process of law by relying on improper factors when sentencing him.

When a defendant asserts that a sentencing court relies on an improper factor or inaccurate information he must show more than that a reasonable observer would see it that way. He must show that the sentencing court “actually relied” on the factor. *Harris*, ¶39. A circuit court “actually” relies on an improper factor when it gives “explicit attention” or “specific consideration” to it so that the factor “formed part of the basis for the sentence.” *Travis*, ¶28. A circuit court need not state

¹⁷ Non-statutory factors that a sentencing court may consider include:

- (1) Past record of criminal offenses;
- (2) history of undesirable behavior pattern;
- (3) the defendant's personality, character and social traits;
- (4) result of presentence investigation;
- (5) vicious or aggravated nature of the crime;
- (6) degree of the defendant's culpability;
- (7) defendant's demeanor at trial;
- (8) defendant's age, educational background and employment record;
- (9) defendant's remorse, repentance and cooperativeness;
- (10) defendant's need for close rehabilitative control;
- (11) the rights of the public; and
- (12) the length of pretrial detention.

Gallion, ¶43 n.11.

that it actually relied on an improper factor in order for an appellate court to conclude that it did. *Id.*, ¶30.

In this case, “actual reliance” is not at issue because the circuit court explicitly stated on the record that Salas Gayton’s noncitizenship was relevant because it goes to his character, that his status as an “illegal alien” “goes to character” and is a “minor character flaw,” and that his presence “here illegally [is] a minor factor, but it goes to [his] character.” (App.160, App.173, App.176).

These explicit statements are just the tip of the iceberg. The sentencing record is saturated with references to Salas Gayton’s alienage, Mexican national origin, and “illegal alien” or “illegal” status. In their letters and statements to the court, the victim’s family and friends referred to his alienage and called him an “illegal alien” in at least 19 separate sentences. To defuse the stereotypes they invoked, defense counsel referred to Salas Gayton’s citizenship and reasons for coming to this country in 10 separate sentences. Salas Gayton alluded to the fact that he is not from the United States once. And the court referred to Salas Gayton’s citizenship status, “illegal alien” status, alienage, Mexican national origin, and Latino heritage in 16 different sentences. Thus, at least 46 sentences in the sentencing record mention Salas Gayton’s alienage or national origin. The information so permeated the proceeding that “actual reliance” is a given. *See Travis*, ¶44 (actual reliance found where court mentioned inaccurate information four times at sentencing and four times at plea hearing).

1. The circuit court improperly relied upon alienage or “illegal alien” status as aggravating sentencing factors.

Though Wisconsin has not yet addressed this issue, decisions from other jurisdictions hold that a court may not

impose a more severe sentence based on a defendant's alienage¹⁸ or status as an "illegal immigrant" or "illegal alien":

U.S. v. Leung, 40 F.3d 577, 586-587 (2d Cir. 1994)(appearance that defendant's ethnicity and alien status played a role in determining her sentence required resentencing).

State v. Mendoza, 638 N.W.2d 480, 482-483, 484 (Minn. Ct. App. 2002)("Sentencing a defendant on the basis of alienage is unconstitutional.")

State v. Zavala-Ramos, 116 Or. App. 220, 222-223, 840 P.2d 1314 (Or. Ct. App. 1992)("defendant's current illegal immigration status cannot, *per se*, be considered to be an aggravating factor" at sentencing.)

Yemson v. U.S., 764 A.2d 816, 819 (D.C. Ct. App. 1991)("Because even an illegal alien has a right to due process, a court imposing a sentence in a criminal case may not treat the defendant more harshly than any other defendant 'solely because of his nationality or alien status.'")

U.S. v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986)(if misused at sentencing, defendant's status as illegal alien from a Latin American country could violate constitutional protections).

U.S. v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989)("the government agrees that a sentencing court cannot impose a more severe sentence on the sole basis of a defendant's alienage or nationality").

¹⁸ Again, according to the Department of Homeland Security, an "alien" is a person who is not a citizen or national of the United States. See <http://www.dhs.gov/definition-terms> (last visited Dec. 8, 2015) and 8 U.S.C. § 1101(a)(3).

U.S. v. Velasquez-Velasquez, 524 F.3d 1248, 1253 (11th Cir. 2008)(“a judge may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual’s immigration status or his personal views of immigration policy.”)

U.S. v. Onwuemene, 933 F.2d 650, 652 (8th Cir. 1991)(remand for resentencing because “consideration of [the defendant’s] alien status, however, violated his constitutional rights.”)

In this case, the circuit court “specifically considered” and gave “explicit attention” to Salas Gayton’s alienage or status as an “illegal alien” as “minor” aggravating factors in fashioning a sentence. That was a constitutional error. The Court should therefore vacate Salas Gayton’s sentence and remand the case for a new sentencing hearing.

2. The circuit court improperly relied on national origin as an aggravating sentencing factor.

This court has stated—in no uncertain terms—that it is improper for a circuit court to consider a defendant’s national origin at sentencing. *Alexander*, ¶23 (citing *Harris*, ¶33 n.9). In the United States, the labels “illegal,” “illegal alien” and “illegal immigrant” implicate the Mexican nationality because Mexicans comprise the largest single group of immigrants in the United States. Indeed, here in Wisconsin, they comprise 76% of the undocumented immigrant population.¹⁹

¹⁹ *What we know about illegal immigration from Mexico*, available at: <http://www.pewresearch.org/fact-tank/2015/11/20/what-we-know-about-illegal-immigration-from-mexico/> (last visited Dec. 20, 2015).

Even if the label “illegal alien” can be applied to persons of other nationalities, the sentencing court here meant it to refer to Mexicans. At the sentencing hearing, no one—other than the court—referred to Salas Gayton’s nationality. Neither Damske’s family and friends, nor the district attorney, nor defense counsel, nor Salas Gayton referenced his Mexican or Latino heritage. The court *sua sponte* mentioned that Salas Gayton is from Mexico or is Latino at least 5 times. In doing so, it blended his “illegal alien” status with his national origin. If there is any doubt on this point, then simply reread the sentencing transcript and substitute the words “Great Britain” and “British” or “Switzerland” and “Swiss” for the words “Mexico” and “Mexican.” The result looks absurd because in the United States the label “illegal alien” or “illegal” is not associated with persons from Great Britain or Switzerland. It is associated with Mexicans and Latinos. In this case, the court’s references to Salas Gayton’s status as an “illegal alien” or an “illegal” were inextricably intertwined with his national origin.

Pursuant to *Harris* and *Alexander*, the circuit court’s reliance on Salas Gayton’s national origin at sentencing was a constitutional error. The Court should therefore vacate Salas Gayton’s sentence and remand the case for a new sentencing hearing.

3. The circuit court invoked a stereotype as an aggravating sentencing factor.

“[S]tereotypes constitute improper sentencing factors, and if a circuit court considers them when imposing a sentence, it has erroneously exercised its discretion” *Harris*, 326 Wis. 2d at ¶71 (Bradley, J dissenting, but noting that the majority agreed with this principle). Calling someone an “illegal” or an “illegal alien” is a slur that invokes a stereotype associated with Latino (usually Mexican) criminals who sneak across the border to take American jobs or

freeload off of taxpayers.²⁰ As noted in Argument I *supra*, this Court recognizes that “illegal alien” status is so negative, so prejudicial that it will not allow a jury to know that a personal injury plaintiff is an “illegal alien” even though that information would be relevant to the calculation of lost future earnings and life expectancy. *Gonzalez*, 137 Wis. 2d at 138-143.

The letters and statements offered in support of Damske invoke the “illegal alien” stereotype loudly and clearly. They make disparaging assumptions like:

*Not only was Mr. Gayton in the country illegally, but he had no driver’s license and no liability insurance so that there might be some reparation for his actions.*²¹
*He clearly availed himself of all the privileges and freedoms of being in America without being willing to assume any of the responsibilities that go along with it.*²²

He clearly and intentionally sought never to comply with the law. Had law enforcement been able to

²⁰Charles Garcia, *Why ‘illegal immigrant’ is a slur*, available at: <http://edition.cnn.com/2012/07/05/opinion/garcia-illegal-immigrants/> (last visited Dec. 15, 2015).

²¹ Many states permit undocumented immigrants to obtain driver’s licenses to ensure that they know how to drive safely and to permit them to obtain insurance for car accidents. Wisconsin is not one of those states. *Ten States (and DC) that Allow Driver’s Licenses for People in the Country Illegally*, available at: <http://immigration.procon.org/view.resource.php?resourceID=005535> (last visited on Dec. 20, 2015).

²²It is unknown what privileges and freedoms the author is referring to. However, undocumented immigrants commit fewer crimes than American citizens. Because they pay taxes but are not entitled to welfare and other benefits, they contribute \$12 billion to Social Security annually. Ruth Marcus, *False Assumptions Underlying Trump’s Immigration Plan*, The Washington Post, August 18, 2015, available at https://www.washingtonpost.com/opinions/trump-flunks-immigration/2015/08/18/f6f7756c-45cb-11e5-8ab4-c73967a143d3_story.html (last visited Dec. 12, 2015).

*identify him as an illegal alien, he would have been deported and this tragic accident would never have occurred.*²³

(James Friedman letter, App.185-186).

*He was selfish, non-law-abiding, non-empathetic, possibly miserable drunk that made choices that can kill innocents—men, women, and children. A person like him should not be allowed on the street at all.*²⁴

(Curt Damske letter, App.187).

*Mr. Gaytan [sic] is in the United States illegally and therefore already a criminal.*²⁵

Mr. Gaytan has no regard or respect for the laws of our country and our community.

*Mr. Gayton had no right to not only live, work and drive in our country;*²⁶

If Mr. Gayton had been turned over to the proper immigration authorities, he would not have been driving the wrong way on I-94 while intoxicated on January 1, 2011—as he would have been previously deported back to his own country.

(Peggy Lamb letter, App. 188).

²³ Actually, federal officials exercise discretion in how they enforce immigration law. Unauthorized workers trying to support their families are less of a priority than those who commit smuggling or other serious crimes. *Arizona v. U.S.*, 132 S.Ct. at 2499.

²⁴ Salas Gayton made the same poor choice that many American citizens make. He drove a car while he was intoxicated.

²⁵ Salas Gayton's presence in the United States is not an ongoing crime. *See U.S. v. Cores*, 356 U.S. 405, 408 n.6 (1958); *Arizona*, 132 S.Ct. at 2505.

²⁶ An undocumented immigrant may live and work in the United States without committing a crime. *Id.*

He had no intentions [sic] of complying with any of the laws of this country, and that was proven when his feet hit U.S. soil as an illegal immigrant.

He came to this country and availed himself of the privileges we provided to our citizens²⁷, but he had no intentions to [sic] complying with our laws. Then he stepped up his lawlessness by killing . . .

(Michelle Friedman letter, App.146-147).

The circuit court called Salas Gayton an “illegal” and an “illegal alien.” In fact, it went so far as to call his “illegal alien” status a “character *flaw*.” In doing this, the court echoed and validated the stereotypes invoked by Damske’s family and friends. The circuit court’s invocation of a stereotype as a sentencing factor was a constitutional error under *Harris*. This Court should therefore vacate Salas Gayton’s sentence and remand the case for a new sentencing.

4. If the circuit court was attempting to equate “illegal alien” status with prior unlawful or uncharged misconduct, then it did so improperly.

When sentencing a defendant, a court may consider his prior criminal history, including uncharged or unproven offenses, facts related to offenses for which the defendant has been acquitted, and charges that are dismissed as a result of a plea bargain, unless these assertions are groundless or unreliable. *State v. Frey*, 2012 WI 99, ¶¶47-48, 343 Wis. 2d 358, 817 N.W.2d 436.

²⁷ Again, it is unclear what privileges this author is referring to. However, the only evidence in the sentencing record on this subject is that Salas Gayton has never applied for or received government aid. (App. 158).

Although Wisconsin has not addressed the issue, in some jurisdictions courts may consider a defendant's unauthorized entry as prior unlawful conduct. *See e.g. Gomez*, 797 F.2d at 420 (Gomez entered country to engage in drug trafficking and "admitted in open court that his entry into this country had been illegal. That illegal act is no different than any other recent prior illegal act of any defendant being sentenced for any offense."); *Zavala-Ramos*, 116 Or. App. at 223 ("Immigration status per se is not relevant. However, circumstances that demonstrate a defendant's unwillingness to conform his conduct to legal requirements, whether or not there are criminal consequences, may be."); *Yemson v. U.S.*, 764 A.2d at 819 (illegal alien cannot be sentenced more harshly due to nationality or alien status, but court can consider his prior violations of immigration law that "reasonably bear on the sentencing decision."))

In this case, the circuit court did not refer to Salas Gayton's "illegal alien" status as prior unlawful conduct. It did not say that Salas Gayton's entry into this country 14 years ago was a misdemeanor or a petty offense or reasonably related to the OWI homicide for which he was being sentenced. It did not mention Salas Gayton's entry into the United States even once during its sentencing rationale. (App.170-180). If the court meant that an immigration violation can be considered prior unlawful conduct, then it had to identify that factor on the record and state how that factor fit the sentencing objectives and influenced the ultimate decision. *Gallion*, ¶43. It did not do so.

In reality, the court had little information about Salas Gayton's entry into the United States or immigration status at the time of sentencing. It heard the unsupported assertions made by Damske's family and friends during a very emotional victim allocution. And it heard defense counsel acknowledge that Salas Gayton is not a citizen and that he

came here to work almost 14 years ago. The court made no further inquiries on this subject. Instead, it repeatedly called Salas Gayton an “illegal alien,” thereby echoing the unfounded assumptions made by Damske’s supporters. A sentence based upon a materially untrue assumption violates due process and cannot stand. *Tiepelman*, ¶10 (citing *Townsend v. Burke*, 334 U.S. 736 (1948) and *U.S. v. Tucker*, 404 U.S. 443, 447 (1972)).

As a practical matter, state sentencing courts are in no position to decide whether a person entered the United States illegally or what his immigration status is for two reasons. First and foremost, the field is preempted by federal law. Congress has invested the authority to determine immigration status exclusively in the Secretary of the Department of Homeland Security. The Secretary may delegate that power to officials under his supervision. *See* 8 U.S. C. § 1103. But state authorities do not have the jurisdiction to regulate immigration questions. *Arizona v. U.S.*, __S.Ct. at 2506-2507.

Second, a person’s “immigration status” depends upon many variables. Unlawful presence can occur without unlawful entry. It is estimated that up to 40% or more of the unauthorized migrants in the United States entered lawfully on a visa (as a tourist or a student or for short term employment purposes) and then simply stayed beyond the term of the visa. Those persons are present unlawfully but they never committed a criminal violation because their entry was lawful. Their only violation of law is civil, not criminal. *See supra* Argument Section I.

Furthermore, without fact finding (by a tribunal with jurisdiction) it is hard to know whether an undocumented immigrant is present in the United States in violation of civil law. Some undocumented immigrants may not realize that they have a legal basis to stay in the United States. For

instance, they may have a claim of political asylum. 8 U.S.C. § 1158. Or they may have right to remain here under the Violence Against Women Act (which allows spouses of both genders to remain in the United States). 8 U.S.C. § 1229b(2). Or they may have a right to stay because they are victims of certain crimes. 8 U.S.C. § 1101(a)(15)(U).

The point is that sentencing courts should not be permitted to just cite “illegal entry” or “illegal alien” or “illegal immigrant” as shorthand references for prior unlawful or uncharged conduct. Doing so lumps together the drug trafficker, the crime victim, the person who came here to work, the student who overstayed a visa by a few days, and the person seeking asylum. That is inconsistent with the goal of individualized sentencing. So if a sentencing court is to consider an alleged immigration violation as prior unlawful or uncharged conduct, then it must have reliable evidence of that conduct, and the conduct must reasonably relate to the sentencing decision. *See Frey*, ¶¶47-48 (re reliability); *Gallion*, ¶43 (re linkage); *Yemson*, 764 A.2d at 819 (re immigration status must reasonably bears on sentencing decision) (citing *Wasman v. U.S.*, 468 U.S. 559, 563-564, (1984)).

The circuit court factored Salas Gayton’s “illegal alien” status into its sentence. It did so based on insufficient, unreliable information and without explaining how being an “illegal alien” reasonably related to the sentence it chose. That was an erroneous exercise of discretion. This Court should therefore vacate Salas Gayton’s sentence and remand the case for a new sentencing.

* * *

In summary, the Court can order a new sentencing hearing for any one of the four reasons above. Or it can consider them together, as facets of the larger problem in this

case. The circuit court had to sentence a defendant who is not a citizen of the United States. The victim's family and friends sought the maximum sentence based upon a constitutionally impermissible factor: the defendant's "illegal alien" status. And they invoked common stereotypes about "illegal aliens." Then the circuit court explicitly stated, several times, that the defendant's "illegal alien" status was a minor factor in its sentencing decision, while repeatedly and unnecessarily referring to his national origin, another constitutionally impermissible factor. The court did so without meaningful and reliable information about the defendant's immigration status and without explaining how his immigration status reasonably related to the harsh sentence that it imposed for the crime at issue. Simply put, the circuit court's approach to sentencing a person who is not a citizen of the United States violated several due process principles and established sentencing protocol.

III. The Court Should Remand This Case for a New Sentencing Hearing.

A. The standard of review is de novo.

Whether an error is structural or subject to a "harmless error" review is a question of law, which this Court decides de novo. *State v. Nelson*, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317. If this Court opts for a "harmless error" review then it will conduct that analysis de novo. *Id.*

B. The Court should order a new sentencing because the circuit court's error was structural.

The United States Supreme Court divides trial court error into two classes. "Trial errors" occur during the presentation of a case to the jury, and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless

beyond a reasonable doubt.” *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)(quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991)). “Structural errors” are not amenable to harmless error analysis because “‘they affect the framework within which the trial proceeds,’ and are not ‘simply an error in the trial process itself.’” *Id.* (quoting *Fulminante* at 309-310).

“A structural error at sentencing includes, for example, a biased tribunal.” *Travis*, ¶57. When a court bases a sentence on alienage, citizenship or national origin appellate courts remand the case for a new sentencing hearing without performing a “harmless error” analysis. *Martinez v. Caceras*, 114 Nev. 735, 738, 961 P.2d 143 (1998)(remand without “harmless error” analysis); *Leung*, 40 F.3d at 587 (same); *U.S. v. Gonzalez*, 76 Fed. Appx. 386, 388-389 (2003)(same for national origin discrimination). Because the circuit court based Salas Gayton’s sentence in part on alienage, citizenship and/or national origin, this court should vacate his sentence and remand the case for a new sentencing hearing.

- C. Alternatively, if the Court opts for a “harmless error” review, then it should order a new sentencing because the circuit court’s errors were harmful.

In *Travis*, this Court noted three variations of the harmless error test for sentencings: **1.** “Errors that do not affect the substantial rights of the adverse party are harmless.” *Id.* ¶68 (citing Wis. Stat. §805.18(1)). **2.** “[A] remand [for resentencing] is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.* that the error did not affect the [sentencing] court’s selection of the sentence imposed.” *Id.* ¶69 (citing Fed. R. Crim. P. 52(a)). **3.** “[A]n error is harmless if it did not contribute to the sentence, that is, if there is no reasonable probability that the error contributed to the outcome.” *Id.* ¶70.

It is the State's burden to prove "that it is clear beyond a reasonable doubt that the same result would have occurred absent the error." *Id.* ¶71.

Regardless of the formulation, the State cannot carry its burden of proof here because the circuit court explicitly stated that it was relying on noncitizenship and "illegal alien" status as "minor factors" and as a "character flaw." Even if this prompted the court to increase Salas Gayton's sentence by only one day, these matters "affected" or "contributed to" his sentence and thus require a new sentencing hearing.

Furthermore, despite the circuit court's comments that these were only "minor" factors, the record suggests that they played an outsized role in Salas Gayton's sentencing. The process of elimination helps prove the point.

First, note what the court said that it was *not* factoring into Salas Gayton's sentence. At the state's suggestion, the court did not consider unverified assertions about other crimes mentioned in Salas Gayton's competency evaluation. (App.156-157). The court also "ignored" Salas Gayton's decision not to complete the PSI. (App.175). And, notably, the court disregarded Salas Gayton's immigration status when it set the terms of his extended supervision. It observed: "I don't know what the United States Government is going to do with you when this sentence is over. I don't know if they're going to deport you. I have no power in this regard." (App.171). The court said that if Salas Gayton is allowed to live in this country during extended supervision, then, among other things, he would have to "seek and maintain full-time employment." (App.179). It "revoke[d] Salas Gayton's driving privileges in the State of Wisconsin for five years," even though Salas Gayton had none by virtue of his immigration status. (App.179).

Second, note the mitigating factors that the court *did* consider in choosing a sentence. The court acknowledged that Salas Gayton had no intent to kill and that this was his first drunk driving incident. (App.173, 178). It noted that Salas Gayton had been sober for several years but got into a disagreement with his girlfriend, which caused him to drink again. (App.176-177). It said: “other than January 1st, 2011, you seem to be a pretty decent guy.” (App.175). It noted that Salas Gayton accepted responsibility and “did not put this family through a trial, of looking at the gruesome autopsy pictures.” (App.177). The court said: “I see remorse. Rarely does a defendant come in here like you and exhibit [the] tears that you did, and they’re genuine. I see that.” (App.177).

Finally, note the aggravating factors that pointed to a higher sentence. The court considered that Salas Gayton was driving with a .145 BAC at about 7:00 a.m. on January 1, 2011. He didn’t even know that he was driving. In an attempt to evade police he inadvertently entered I-94 the wrong way and drove for about a mile at 50 miles per hour. He sideswiped another driver. He did not have a license. (App.172-173). The court mentioned that Salas Gayton previously received a municipal citation and was convicted of a misdemeanor for driving without a license. (App.161).

The court faulted Salas Gayton for not seeking out a place that caters to Latinos to help him with his drinking problems. (App.178).²⁸

The court noted the community’s interest in how it would sentence Salas Gayton as evidenced by the 4 television cameras trained on the proceeding. (App.174). The court wanted the community to know what happens to someone

²⁸Salas Gayton told Dr. Pankiewicz that while he had not received formal treatment, he had been in Alcoholics Anonymous and had had a sponsor. (R.11 at 2).

who takes a car—“a weapon”—and drives drunk and kills somebody. It said “if you drive drunk first time, second time, third time, fourth time, fifth time, you go to prison.” (App.174).²⁹

The court considered that Damske was “34 years old, beautiful, out on the first day of the year driving. Minding her own business and tragically taken away.” (App.176). It also noted that she had a young daughter, and it will be tough for her to get along. (App.175). The court did not consider that Damske had a .21 BAC when she died.

The court also considered, over and over, that Salas Gayton is an “illegal alien,” an “illegal,” a “noncitizen,” a Latino from Mexico and “not from this country.” It mentioned these subjects in at least 16 sentences. For instance:

The fact that *you’re an illegal alien* doesn’t enter into the serious nature of the crime or the need to protect the community. *It goes to character. It’s a minor character flaw very honestly.*

(App.173). (Emphasis supplied).

Ms. Johnson: *The fact as I see it that Mr. Salas is not a citizen* in my opinion, as it relates to this case, *is not terribly relevant.* He came—

The Court: *It goes to character.*

(App.160). (Emphasis supplied).

You’re from the nation of Mexico. You’ve got a 5th grade education. *You’re in this country for 13 and a*

²⁹ This statement of law is inaccurate. In Wisconsin, a first OWI is a civil offense, and a person who commits OWI homicide may be placed on probation.

*half years, Milwaukee for two years. You've got three kids in Mexico. . .*³⁰

You've got sporadic employment, trying to better yourself. That's why you're in this country. Although *you're here illegally, it's a factor, a minor factor, but it goes to your character. . .*

[Ms.] Johnson correctly stated that [alcohol] never intervened in his life. Never had a serious enough crime for us to try and intervene. But he could have done that on his own, even as *an illegal* in this country.

There's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems. He could have done it on his own. *He didn't.*³¹

(App. 175-176, 178). (Emphasis supplied).

If Salas Gayton's drunk driving and his attendant poor decisions were truly the most significant factors in the court's decision to impose the 15-year maximum term of initial confinement, then the double standard applied is startling. Defense counsel pointed out that in cases like this one courts will often give out lighter sentences or even place the defendant on probation with substantial condition time and community service. (App.163). See *Gallion*, ¶47 (when sentencing a defendant courts may consider sentences given in similar cases). That is correct. One recent defendant, who drove with a .27 BAC, crossed the center line and crashed into another car, killing a baby and seriously injuring 3 others. She received a sentence of 6 months jail time,

³⁰ This is inaccurate. Dr. Pankiewicz's report indicates that Salas Gayton's children are in the United States. (R.11 at 2).

³¹ Again, this does not accurately reflect what Salas Gayton told Dr. Pankiewicz. (R.11 at 2).

imposed and stayed.³² Another defendant, having no prior criminal record, crashed and killed 3 people while driving drunk and received only a 5-year term of confinement.³³ Yet another, in her first OWI, crossed the center line with a .174 BAC and crashed into and killed a high school senior. She received a one-year jail sentence.³⁴ In fact, according to a recent investigative news report, the median term of initial confinement imposed for an OWI homicide in Wisconsin is just 5 years.³⁵

Damske's family and friends placed Salas Gayton's "illegal alien" status and all the stereotypes that went with it front and center at his sentencing hearing. His alienage and nationality were invoked one way or another in at least 46 sentences in the sentencing record. The stigma infected the entire proceeding, including the court's decision to impose the 15-year maximum term of incarceration. The court's reliance on Salas Gayton's "illegal" or "illegal alien" status to sentence him more severely was not a harmless error.

³² *OWI Variation: Tragedy to some, accident to others*, Postcrescent.com, available at <http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/> (last visited Dec. 11, 2015).

³³ *Similar Cases Yield Very Different Results in Wisconsin Prison System*, Milw. Journal Sentinel, p.1, Nov. 29, 2014 available at: <http://www.jsonline.com/news/wisconsin/similar-cases-yield-very-different-results-in-wisconsin-prison-system-b99394769z1-284234631.html> (last visited Dec. 11, 2015).

³⁴ *Waupaca Case Raises Questions About Sentencing*, Action News 2 WBAY.com available at: <http://wbay.com/2015/11/23/family-says-drunk-driver-got-away-with-murder/> (last visited Dec. 11, 2015).

³⁵ Eric Litke, *Scales of Justice or Roulette Wheel?* Available at: <http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/> (last visited Dec. 14, 2015).

CONCLUSION

For the reasons stated above, Leopoldo Salas Gayton respectfully requests that the Wisconsin Supreme Court reverse the court of appeals decisions and remand this case for a new sentencing hearing.

Dated this 23rd day of December, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,711 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of December, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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